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10 Attorneys for Defendant
11 Wendy's International, Inc.

12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14

15 ELLIOTT LEWIS, an individual, on
16 behalf of himself, and all others
17 similarly situated,

17 Plaintiff,

18 v.

19 WENDY'S INTERNATIONAL, INC.,
20 a Corporation; and DOES 1-20,
21 inclusive,

21 Defendant.
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Case No. 09-CV-7193 MMM (JCx)

Assigned for all purposes to
Honorable Margaret M. Morrow

**DECLARATION OF MARK D.
KEMPLE IN SUPPORT OF
DEFENDANT WENDY'S
INTERNATIONAL, INC.'S
MOTION TO DISMISS/STRIKE
SECOND AMENDED
COMPLAINT WHICH FAILS
TO HEED THE COURT'S
SCHEDULING ORDER AND
FEDERAL RULES OF CIVIL
PROCEDURE 15 AND 16**

Date: June 28, 2010
Time: 10:00 a.m.
Place: Roybal - Courtroom 780

KEMPLE DECLARATION IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

I, Mark D. Kemple, declare as follows:

1. The following is based on my personal knowledge and, if called upon to do so, I could and would testify competently thereto.

2. I am a partner in the law firm Jones Day, counsel of record for Wendy's International, Inc. ("Wendy's") in the above-captioned matter. I am duly licensed to practice law in the State of California. I am a member in good standing of the California Bar.

3. On December 21, 2009, this Court held a Scheduling Conference in this matter. Attached hereto as Exhibit 1 is a true and correct copy of the official transcript of that proceeding, which was prepared by Mark Schweitzer, CSR, RPR, CRR, Official Court Reporter for the United States District Court.

4. Attached hereto as Exhibit 2 is a true and correct copy of a letter that I sent to Michael Jacob, Plaintiff's counsel in this matter, on January 7, 2010.

5. Attached hereto as Exhibit 3 is a true and correct copy of a letter I received from Michael Jacob on January 6, 2010.

6. Attached hereto as Exhibit 4 is a true and correct copy of an Email exchange I had with Michael Jacob on January 7, 2010.

7. Attached hereto as Exhibit 5 is a true and correct copy of a letter dated December 24, 2009, that I received from Michael Jacob, the original of which was addressed to the California Labor & Workforce Development Agency. Mr. Jacob confirmed in the meet and confer which preceded this motion that his December 24, 2009 letter is the basis for Plaintiff's claim to have exhausted his administrative remedy; no other letter is claimed to have been sent by Plaintiff in this regard.

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EXHIBIT 1

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE MARGARET M. MORROW, JUDGE PRESIDING

ELLIOTT LEWIS, ET AL.,	:	
	:	
PLAINTIFF,	:	
	:	
VS.	:	NO. CV 09-7193-MMM
	:	
WENDY'S INTERNATIONAL, INC.,	:	
ET AL.,	:	
	:	
DEFENDANT.	:	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
MONDAY, DECEMBER 21, 2009

MARK SCHWEITZER, CSR, RPR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
181-H ROYBAL FEDERAL BUILDING
255 EAST TEMPLE STREET
LOS ANGELES, CALIFORNIA 90012
(213) 663-3494

1 Appearances of Counsel:

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11 For the Defendant:

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I N D E X

MATTER: Defendant's motion to dismiss class action
complaint and to strike; Scheduling conference.

Los Angeles, California; Monday, December 21, 2009

10:17 A.M.

WHEREUPON THE CASE HAVING BEEN CALLED AND
APPEARANCES GIVEN, THE FOLLOWING PROCEEDINGS
WERE HELD:

THE COURT: We have the matter on calendar for a
hearing on the defendant's motion to dismiss the complaint and
also motion to strike as well as a scheduling conference. The
Court prepared a tentative ruling regarding the motion. Did
you want to be heard, Mr. Kemple?

MR. KEMPLE: Yes, thank you, your Honor. First,
thank you for taking the time that you obviously took in
reviewing our papers and preparing this very detailed
tentative ruling. And I don't intend to try and go through
everything that I lost, but there were a few things that I did
want to discuss hopefully. I appreciate the fact that the
Court recognizes that plaintiff has pled a somewhat unique
case in that it's relying on a company-wide policy on these
meal and rest break claims. Our issue here is that we still
don't understand what defendants contend the policy to be. Is
it a policy that --

THE COURT: You are the defendants.

MR. KEMPLE: Excuse me, the plaintiffs.

THE COURT: Okay.

MR. KEMPLE: Is it a policy that -- as we believed,

1 we think the law is fairly unclear in this area, and certainly
2 that is the suggestion by the California courts of appeal, and
3 now the California Supreme Court. And the question is is it a
4 violation of law to fail to ensure that an employee takes a
5 break, whether or not they want to waive the break, or is it a
6 violation of law if you provide it, and the employee simply --
7 and then you authorize the break, but an individual manager,
8 for example, coerces in some fashion.

9 So there are two different standards up before the
10 California Supreme Court, and nobody knows what they are going
11 to do. And the issue that we have is that we don't know which
12 of these legal -- which set of facts the plaintiff is
13 proceeding under, and given that we don't know what this
14 policy is that we're claiming that we have that violates the
15 law.

16 And when you turn that over to the class side. And
17 I understand the Court's cited the cases that indicate that
18 it's rare that you address class allegations at the pleading
19 phase. But the problem we have here is we can't ascertain who
20 would even be in this class. The class is defined by the
21 violation of law that will be found at a trial in this action.

22 So who was not provided a meal and rest break just
23 begs the ultimate legal question in the case. And there's a
24 lot of case law that says that that's never a proper
25 definition for a class. So I understand the commonality,

1 typicality representative perhaps should await class
2 certification under a body of case law, but there seems to be
3 a fundamental sort of threshold issue on the class definition
4 that we don't know who would be in this class in any event,
5 that gets the cart before the horse.

6 So my points on the provide standard being uncertain
7 here go to all the causes of action. There's just one other
8 cause of action that I wanted to focus on specifically. And
9 that is the 226 cause of action. 226 is the inaccurate wage
10 statement statute. And it lists out a number of items that
11 have to be accurately reported. The problem we have here is
12 that the only allegation in the complaint is that we failed to
13 indicate when, if at all, plaintiffs received meal periods.
14 And as the Court points out, well, that's not required under
15 the statute. So that's the allegation of the pleading. It
16 clearly is deficient, I think as the Court has pointed out.

17 They are now saying that, well, you failed to list
18 the total hours worked. They do this in opposition. The
19 problem with that is if you miss a meal period, the hours are
20 reported. You are not off the clock. So there's no
21 under-reporting of hours here. And no over-reporting of hours
22 even based on the allegations, even if they change their legal
23 theory that the issue is failure to under or over-report the
24 number of hours. Missing a meal or rest break, you are still
25 on the clock. So the hours show up. So I just don't see any

1 violation of 226. And of course, rest breaks are always on
2 the clock. So you're on the clock.

3 If anything, the allegation is that we're having
4 them clock in for a longer period of time than they should
5 because they should be getting meal and rest break claims, but
6 there's no allegation that the hours shown on the time sheets
7 or on the wage statements is more or less than the hours
8 worked. But we're already outside the pleading because the
9 pleading allegation is we failed to indicate if and when the
10 plaintiff received the meal periods, which is not required by
11 the statute.

12 So I respectfully suggest that that claim, even
13 before we get to the whole injury question, there's a split in
14 the case law between Elliott and the cases the Court cited,
15 and I know the Court has looked at that and made her decision,
16 but even before you get to that, the basic violation is not
17 pled on these facts.

18 So I believe all the claims should be re-pled to
19 clear up what they mean by provide. We know there's a dispute
20 in the law, and all they offer is failed to provide. That
21 could mean two very different things under two different legal
22 rubrics or analyses. That runs to all the claims. And
23 particularly the class. Because we just -- even if the Court
24 allowed the plaintiff to go forward at this point, we don't
25 know who this class is. People who were not provided meal and

1 rest breaks, we'll never know who that is until the end of the
2 day. And then on 226 I made my point. There's a fundamental
3 failure to plead.

4 Thank you, your Honor.

5 MR. JACOB: Your Honor, I've already informed
6 counsel that we're submitting on the tentative, your Honor.
7 And we can file an amended pleading in 10 days. And I wanted
8 to note to the Court that we will be filing the Labor Code 269
9 PAGA letter to amend to allege the 558's, your Honor.

10 THE COURT: Why don't you respond to his arguments?

11 MR. JACOB: With regard to the arguments as to the
12 two standards with regards to the provide regarding meal
13 periods, your Honor, we believe that we will be -- we will be
14 able to meet both standards. I think the complaint as pled
15 does indicate that they did have a policy, and I'll limit my
16 arguments to the facts of the complaint by indicating that
17 they did have a policy of failing to provide meal periods
18 within --

19 THE COURT: Does that mean that they didn't let
20 people take them? Is the policy we don't let our people take
21 rest breaks and meal breaks?

22 MR. JACOB: Responding to that, your Honor, I would
23 say it's not expressly we don't let our people take meal
24 breaks, but I believe the manner in which it is administrated
25 creates a policy that doesn't allow the employees the

1 opportunity, and also specifically in this case I believe
2 there's also meal period waivers which the way that they were
3 enforced resulted in a policy of people not being afforded the
4 meal period in accordance with the law.

5 THE COURT: I don't actually think you responded to
6 my question. I've got a tentative here that says you pled
7 there's a company policy that people didn't get meal breaks.
8 And I don't think that's what you're telling me.

9 MR. JACOB: I think with regards to the --

10 THE COURT: So if that's not what you're telling me,
11 why shouldn't have you to re-plead it?

12 MR. JACOB: I'm not saying that there is -- there's
13 no express policy, your Honor, but it's a policy and practice.

14 THE COURT: That the company doesn't give its
15 employees meal breaks?

16 MR. JACOB: Yes, your Honor.

17 THE COURT: And rest periods?

18 MR. JACOB: Yes, your Honor.

19 THE COURT: Not that the company doesn't ensure that
20 they take them.

21 MR. JACOB: And that the company's manner in which
22 they schedule the employee dissuades and impedes the employees
23 from taking those breaks.

24 THE COURT: Okay.

25 MR. JACOB: And with regards to 226, your Honor, the

1 resulting fact that the hours are incorrect on the statements
2 results in the 226 penalty which we think we properly pled.

3 THE COURT: Meaning that they don't reflect the
4 extra hour you get if you don't get a meal period or a rest
5 period.

6 MR. JACOB: Correct.

7 THE COURT: Okay.

8 MR. KEMPLE: Your Honor, there's no extra hour
9 worked for the premium wage. So the notion that if you missed
10 a 10-minute break, your wage statement is supposed to reflect
11 an additional hour worked is completely inaccurate under the
12 law. You're supposed to receive a premium wage, but the hours
13 worked are accurately recorded. And then you get a premium
14 for the hours worked.

15 THE COURT: Isn't that supposed to be reflected on
16 the wage statement, too?

17 MR. KEMPLE: That's a different issue.

18 THE COURT: Yes or no.

19 MR. KEMPLE: Yes, the additional wage should be
20 shown.

21 THE COURT: Thank you.

22 MR. KEMPLE: On the provide standard, your Honor --

23 THE COURT: So see, here's the thing, Mr. Kemple. I
24 mean I love these motions where they are filed to educate me
25 about the positions of the parties and all of that kind of

1 thing, and that's what I feel like is going on here. That
2 gee, he's not really a nonexempt employee, and gee, there are
3 all these other issues about whether or not he can prove a
4 company policy. But you know, we know what the 226 claim is
5 about. We know that it's a claim that you didn't write down
6 allegedly the meal periods and the rest periods that weren't
7 given. So why should we go through another whole situation
8 of, you know, granting a motion to dismiss, having him say
9 that, when we all know what it's about?

10 MR. KEMPLE: Because the point I'm making, and it's
11 a very valid point, your Honor, and I'm not being
12 obstreperous, and I'm not merely trying to educate the Court.
13 I'm sure the Court doesn't need an education. The 226 claim
14 is not about hours worked. It gets into this premium wage
15 issue, and this then brings it back to this provide issue.
16 Look, counsel was asked a very direct question. What are you
17 alleging here? And we heard both company policy and the way
18 it's administered in the trenches, and we heard both the
19 ensure standard and we heard the coerce standard. And --

20 THE COURT: Well, the one thing I didn't hear was
21 the ensure standard. I heard some other things. But I didn't
22 hear that.

23 MR. KEMPLE: Okay.

24 THE COURT: And that seems to be your big issue,
25 which is, you know, did we not let them take them, or did we

1 not force them to take them?

2 MR. KEMPLE: But your Honor, if it's not the ensure
3 standard, that's the only clean standard. If they are
4 stepping away from that in terms of pleading and they are
5 saying well, it depends upon each individual's circumstance --

6 THE COURT: Well, he didn't -- I mean he's alleging
7 more than that. He's alleging that basically there was a
8 company wide practice of not allowing people to take these
9 breaks.

10 MR. KEMPLE: But I thought I also heard that it
11 depended on the way it was administered. So sometimes they
12 got them and sometimes they didn't. Well, then you get into
13 okay, it's not merely pleading a company wide standard of not
14 ensuring. Now you get into that minutia. But there's not a
15 single circumstance alleged where so and so worked X hours,
16 the manager authorized the person, the person wanted to take
17 it, and the person was coerced not to take it.

18 On the pleading basis, that is exactly what the
19 Court's tentative looked at it differently, and I understand
20 the Court's ruling that okay, if they interprets it to mean
21 the ensure standard was a company-wide policy that nobody gets
22 meal and rest breaks, you've put the company on notice as to
23 what's at issue. But if it's a different standard, sort of an
24 in the trenches, the circumstances didn't permit, and people
25 were dissuaded and such, that's a very, very different

1 standard, and we don't have any allegations in that regard.

2 And what Twombly says is that the keys to discovery
3 are not opened in federal court by simplifying a cause of
4 action, a statute you want to pursue. You have to put forward
5 a basis, and that's exactly what's missing here.

6 Again, I think the Court's tentative, I understood
7 it when you say this is unusual. This is a unique company
8 policy to not give any breaks. You've been told nobody gets
9 breaks. So you know what you are defending against. It's
10 this policy. But that just went out the window. And now
11 we're into a different issue, which is exactly why we pointed
12 out the ambiguity of provide. And there are no facts alleged,
13 and how do you go forward on a class-wide basis.

14 Particularly, and switching gears here to the motion
15 to strike, this case is particularly different because we
16 don't know who could be in the class. The class is defined to
17 be people who at the end of the day will be found not to have
18 been provided breaks. Who gets notice until we get a judgment
19 in this case?

20 THE COURT: You know, that's a great argument at the
21 class certification stage. It's in fact one of the
22 defendant's, using that globally, favorite arguments, that the
23 class isn't ascertainable, and we don't know who is in the
24 class, and how can we give notice to it. And if this is a
25 situation in which there's not a company-wide practice or

1 policy, then yeah, that's going to be a big problem for the
2 plaintiff, but there's no way I'm going to decide that on a
3 motion to dismiss. And I have your argument, and I'll take it
4 under advisement. Okay?

5 MR. KEMPLE: Thank you.

6 THE COURT: Let's proceed to the scheduling
7 conference.

8 The Court is going to set the following dates in
9 this case.

10 Initial disclosures have not been made here; is that
11 correct?

12 MR. KEMPLE: Today.

13 THE COURT: By January 11, counsel, if you'd make
14 those initial disclosures.

15 The deadline for the filing of motions or
16 stipulations seeking to amend pleadings to add new parties,
17 new claims, or new defenses will be January 19.

18 Any amendments that are required by the Court's
19 ruling on the motion to dismiss will be governed by a separate
20 date, and that will be the date in the order. This is for any
21 general additional amendments that either party wishes to
22 make.

23 The fact discovery cut-off date -- well, the
24 schedule for filing a class certification motion will be as
25 follows. And I will not extend these dates. So be advised

1 and do what you need to do within this schedule.

2 The class certification notion must be filed by
3 April 12.

4 Any opposition must be filed by May 10. And the
5 hearing on that motion will be June 21 at 10:00 A.M.

6 The overall fact discovery cut-off date in the case
7 will be August 6.

8 Any experts must be disclosed and their reports
9 exchanged on that same day, August 6.

10 Any rebuttal experts must be disclosed and their
11 reports exchanged on August 20.

12 The expert discovery cut-off date in the case will
13 be September 3.

14 The motion hearing cut-off date will be September 27
15 at 10:00 A.M.

16 We'll hold a pretrial conference on October 25 at
17 9:00 A.M.

18 And the trial date in the case will be November 16
19 at 8:30 A.M.

20 I'd like to hold a further telephonic status
21 conference with counsel on July 15 at 5:15 P.M. And I'd like
22 plaintiff to initiate that call with counsel and the Court on
23 the line.

24 The Court would like the parties to file their local
25 Rule 16-14 election by January 25.

1 And the deadline for the completion of a settlement
2 proceeding in this case will be August 23.

3 MR. JACOB: Your Honor, I missed one date. I
4 apologize. The motion cutoff was September?

5 THE COURT: September 27 at 10:00 A.M. That's a
6 motion hearing cut-off date. Okay. All right, counsel.
7 Thank you very much.

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9 (Proceeding concluded at 10:37 A.M.)

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C E R T I F I C A T E

I hereby certify that pursuant to Title 28,
Section 753 United States Code, the foregoing is a true and
correct transcript of the stenographically reported
proceedings in the above matter.

Certified on January 15, 2010.

MARK SCHWEITZER, CSR, RPR, CRR
Official Court Reporter
License No. 10514

EXHIBIT 2

JONES DAY

555 SOUTH FLOWER STREET • FIFTIETH FLOOR • LOS ANGELES, CALIFORNIA 90071-2300
TELEPHONE: 213-489-3939 • FACSIMILE: 213-243-2539

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mkemple@jonesday.com

JP597448

January 7, 2010

Via Facsimile to 310 273-6137 and email

Michael G. Jacob, Esq.
Kesluk & Silverstein, P.C.
9255 Sunset Blvd., Suite 411
Los Angeles, CA 90069

Re: *Lewis v. Wendy's*

Dear Michael:

Pursuant to the Court's December 29, 2009 Order granting Wendy's Motion to Dismiss in its entirety, your amended pleading, if any, is due on January 19, 2010. In your Opposition to that Motion, and at the hearing of it, you requested, and the Court granted, leave to attempt to state one new claim – a Section 558 PAGA claim in lieu of the direct 558 claim you attempted to state (and was subsequently dismissed by the Court).

Your PAGA notice, however, dated December 24, 2009, however, suggested that you seek to add a plethora of new PAGA claims to your pleading, apart from Section 558. Accordingly, by email dated January 5, I wrote to you stating that: "Though your letter identifies a number of statutes on which you'd now like to pursue PAGA penalties, you requested and received leave to amend to attempt to state a PAGA claim concerning just one – Section 558. Please confirm that any amended pleading filed by Plaintiff will not seek to plead claims other than that for which Plaintiff requested and obtained leave. Thanks, and best regards, Mark."

By letter dated January 6, you responded: "With regards to your January 5, 2010 email about limiting the PAGA claims to Labor Code § 558, PAGA permits amendment as a matter of right. Accordingly, at the present time, we do not believe that Plaintiff's ability to amend is limited as you contend in your letter."

Your construct violates numerous Rules and Orders of the Court. As you know, Plaintiff is beyond his ability to amend of right. Indeed, after the Court set the FRCP Rule 16 deadlines on December 21, an amendment is permitted only for "good cause." Further still, the Court ordered on December 21, 2009, that if any party wished to amend *beyond* any leave granted by her Order on Defendant's Motion to Dismiss, that party must file a motion to amend to add such claims by no later than January 19, 2010. In short, you may amend your pleading beyond the confines of the leave previously requested and received, only after meeting and conferring, a motion and an order. Your assertion that a state statute (regarding amendment of a state pleading) trumps all the foregoing procedures of the Federal Court, including FRCP Rule

LAJ-3081432v1

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JONES DAY

Michael G. Jacob, Esq.
January 7, 2010
Page 2

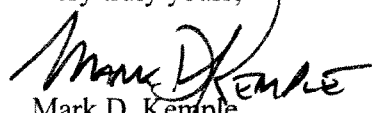
15, the Court's Meet and Confer requirements, and the Court's Scheduling Order, runs directly afoul of the *Erie* Doctrine (and common sense). Federal Court procedure applies here. Accordingly, if you would like to allege new claims other than a Section 558 PAGA claim, you are required to comply with the Court's procedures, orders and deadlines. You have not done so.

In addition, and even as to a PAGA Section 558 claim, your PAGA is wholly non-compliant. Before a plaintiff may file such claims, she/he must plead that she/he has exhausted administrative requirements by providing notice to the LWDA of "specific provisions of the code alleged to have been violated, including the facts and theories to support the alleged violation". Labor Code § 2699.3(a) (emphasis added). The purpose of this notice is to allow the California Labor Workforce Development Agency ("LWDA") to act first on claims it deems worthy of pursuing. The Legislature put these exhaustion requirements in place to "improve[] [PAGA] by allowing the [LWDA] to act first on more 'serious' violations." *Caliber Bodyworks, Inc. v. Super. Ct.*, 134 Cal. App. 4th 365, 375 (2005). The Legislature further declared that it was "in the public interest" to ensure that "state labor law enforcement agencies' enforcement actions have primacy over any private enforcement actions pursuant to this Act." *Id.* at n. 6. PAGA bears out these purposes by, among other things, requiring private individuals to provide notice to the LWDA before bringing suit, giving the LWDA the initial right to prosecute, and cutting off a private cause of action in cases where the LWDA cites an employer for violations. Labor Code § 2699(a), (f)-(h); *Caliber*, 134 Cal. App. 4th at 374.

Your "notice" plainly fails to provide the LWDA the required notice. Indeed, it contains even less than the prior pleading that the Court found to be deficient because, in the Court's words, it "does not give defendant adequate notice regarding the nature of the claims to which it must respond or sufficiently state the facts on which the claims are based." Docket Entry 20, at 10:10-12 (emphasis added). Patently, you have not set forth the "specific provisions of the code alleged to have been violated, including the facts and theories to support the alleged violation". Plaintiff must also plead inaction by the LWDA, and inaction by the employer within the requisite time periods. As all courts to have addressed this issue have held – including the Court in the instant action – a litigant who fails to plead satisfaction of these exhaustion requirements fails to state a PAGA claim for relief. Docket Entry 20, at n. 43; *Caliber*, 134 Cal. App. 4th at 381-384; *Thomas v. Home Depot USA, Inc.*, 527 F. Supp. 2d 1003, 1007 (N.D. Cal 2007); *Waisbein v. USB Fin. Servs.*, 2008 U.S. Dist. LEXIS 21727 *2-*3 (N.D. Cal. 2008).

I urge you to reconsider your course, and am happy to discuss same.

Very truly yours,


Mark D. Kemple

LA-3081432v1

EXHIBIT 3

BRIAN S. KESLUK
DOUGLAS N. SILVERSTEIN
MICHAEL G. JACOB
DAVID A. COHN
BENJAMIN J. ZICHERMAN



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Michael G. Jacob, Esq.
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January 6, 2010

Via Email & Facsimile (213-243-2539)

Mark Kemple
Jones Day
555 South Flower Street
50th Floor
Los Angeles, CA 90071

Re: Lewis v. Wendy's

Dear Mark:

We are in receipt of your letter of yesterday's date. To avoid unnecessary motion practice, we preliminarily note that we will be happy to work with you to arrange a mutually convenient date for the deposition. In this regard, we are amenable to continuing the deposition to a date in which you are available on or soon after February 3, 2010 (30 days from service of the deposition notice).

While you requested that we arrange a meet and confer sometime this week, my schedule is tight this week, as I have a major filing on Monday, am in deposition all day tomorrow, and am out of town over the weekend. Accordingly, we would like to have an opportunity to substantively review your letter and ask that you provide some convenient times to permit us to schedule a further meet and confer discussion to occur sometime next week.

With regards to your January 5, 2010 email about limiting the PAGA claims to Labor Code § 558, PAGA permits amendment as a matter of right. Accordingly, at the present time, we do not believe that Plaintiff's ability to amend is limited as you contend in your letter.

KESLUK & SILVERSTEIN

Mr. Mark Kemple, Esq.
January 6, 2010
Page 2 of 2

If you have any questions or concerns regarding the foregoing, do not hesitate to contact me. Thank you for your courtesy and professionalism.

Very truly yours,

KESLUK & SILVERSTEIN

A handwritten signature in black ink, appearing to read "Michael Jacob", with a stylized flourish at the end.

Michael Jacob, Esq.

cc: Douglas N. Silverstein, Esq.
Alan Burton Newman, Esq.

EXHIBIT 4

----- Forwarded by Mark D. Kemple/JonesDay on 03/23/2010 02:44 PM -----

From: "Michael Jacob" <mjacob@californialaborlawattorney.com>
To: "Mark D. Kemple" <mkemple@JonesDay.com>
Cc: "Douglas Silverstein" <dsilverstein@californialaborlawattorney.com>, "Edward Antonino" <eantonino@californialaborlawattorney.com>
Date: 01/07/2010 12:27 PM
Subject: RE: Lewis v. Wendy's

Agreed.

From: Mark D. Kemple [mailto:mkemple@JonesDay.com]
Sent: Thursday, January 07, 2010 11:19 AM
To: Michael Jacob
Cc: Douglas Silverstein; Edward Antonino
Subject: Re: Lewis v. Wendy's

Michael, As you'll recall, the Court ordered the initial exchange of information to occur on January 11, 2010. I propose that we comply by exchanging them when we meet this coming Monday. Concur?



Mark D. Kemple
Partner

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=====

This e-mail (including any attachments) may contain information that is private, confidential, or protected

EXHIBIT 5

BRIAN S. KESLUK
DOUGLAS N. SILVERSTEIN
MICHAEL G. JACOB
DAVID A. COHN
BENJAMIN J. ZICHERMAN



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Michael G. Jacob, Esq.
mjacob@californialaborlawattorney.com

December 24, 2009

Via Certified Mail with Return Receipt Requested

California Labor & Workforce Development Agency
801 K Street, Suite 2101
Sacramento, CA 95814

**Re: Labor Code Sec. 2699 Notice
Elliott Lewis vs. Wendy's International**

Dear Sir or Madame:

Pursuant to Labor Code Sec. 2699.3(a)(1), Elliott Lewis on behalf of himself and all similarly situated employees, hereby gives written notice of the intent to file a Labor Code Sec. 2699 claim against Wendy's International, Inc. This notice is being provided to both the California Labor & Workforce Development Agency and Wendy's International, via certified mail.

Plaintiff Elliott Lewis became employed by Defendant Wendy's International on or about September 11, 2000 in the city of Ontario, CA. Plaintiff worked as a crew member and shift manager for Defendant at various locations until on or about March 6, 2009. While employed with Defendant, Plaintiff performed capably and professionally. During the relevant time period, Defendant impeded, discouraged and prevented Plaintiff and other California non-exempt employees from taking meal and rest breaks in accordance with the law. Defendant's policies and company wide practices also prevented Plaintiff and similarly situated non-exempt employees in California from taking meal and rest breaks.

Despite Plaintiff and the class working through meal and rest periods in violation of California, Defendant failed to compensate Plaintiff other California non-exempt employees with meal and rest period premiums as required by law. Defendant also failed to provide Plaintiff accurate itemized statements in violation of California Labor Code § 226.

KESLUK & SILVERSTEIN


Calif. Labor & Workforce Development Agency
December 24, 2009
Page 2 of 2

The specific provisions of the Labor Code that the Defendant has violated, include, but are not limited to Labor Code §§ 201, 202, 203, 204, 210, 226, 226.7, 510, 512, 558, and 1194.

I look forward to receiving your response to this letter pursuant to Labor Code Sec. 2699.3(a)(2)(A). Thank you and please do not hesitate to call with any questions.

Very truly yours,

KESLUK & SILVERSTEIN



MICHAEL G. JACOB
Attorney at Law

Cc: Attorney of Record for Defendant Wendy's International, Inc.
Mark D. Kemple, Esq.
JONES DAY
555 South Flower Street, Fifteenth Floor
Los Angeles, CA 90071-2300